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District of Nevada
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DISTRICT OF NEVADA

BY _____ DEPUTY

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 2:11-CV-1256-PMP (RJJ)

ANY AND ALL FUNDS SEIZED FROM
SUNCOAST SCHOOLS FEDERAL CREDIT
UNION, ACCOUNT NO. xxxxxx-6051 ON
FEBRUARY 8, 2011 IN THE NAME OF
THIDARAT TUNGWONGSATHONG AND IN
THE AMOUNT OF \$34,169.36;

ANY AND ALL FUNDS SEIZED FROM
SUNCOAST SCHOOLS FEDERAL CREDIT
UNION, ACCOUNT NO. xxxxxx-6068 ON
FEBRUARY 8, 2011 IN THE NAME OF
THIDARAT TONGWONGSATHONG AND IN
THE AMOUNT OF \$25.99;

ANY AND ALL FUNDS SEIZED FROM JP
MORGAN CHASE BANK, ACCOUNT NO.
xxxxxx1087 ON MARCH 29, 2011 IN THE
NAME OF THIDARAT TUNGWONGSATHONG
AND IN THE AMOUNT OF \$434.91,

Defendants.

EX PARTE MOTION FOR AN ORDER TO SEAL
AND TO STAY THE CIVIL ACTION AND ORDER

1 The United States of America, by and through Daniel G. Bogden, United States Attorney, and
2 Michael A. Humphreys, Assistant United States Attorney, respectfully moves this Court for an Order
3 to seal and to stay this above-captioned civil forfeiture action. The grounds for sealing and staying
4 this civil action are to protect the grand jury investigation, the grand jury information, the ongoing
5 criminal investigation, and the cooperating witnesses, and to prevent civil discovery in this case at this
6 time which would adversely affect the ability of the United States to conduct the related grand jury
7 investigation and criminal investigation.

8 This motion is made and is based on the attached Points and Authorities.

9 Dated this 19th day of August, 2011.

10 Respectfully submitted,

11 DANIEL G. BOGDEN
12 United States Attorney

13
14 /s/ Michael A. Humphreys
15 MICHAEL A. HUMPHREYS
16 Assistant United States Attorney
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a civil forfeiture action brought by the United States against the defendant \$34,169.36 for violations of Title 18, United States Code, Sections 1956 and 1957; and Title 18, United States Code, Section 1343. The \$34,169.36 is subject to civil forfeiture under Title 18, United States Code, Sections 981(a)(1)(A) and (a)(1)(C).

The factual basis for the forfeiture under Title 18, United States Code, Sections 981(a)(1)(A) and (a)(1)(C) is set forth in the Verified Complaint for Forfeiture In Rem and the Verification previously filed in this matter. They show the defendant money is proceeds of the crimes enumerated above.

On August 3, 2011 the United States filed its Complaint for Forfeiture In Rem and initiated the instant civil forfeiture action. The United States requests this Court enter an Order to Seal and to Stay the Complaint and this Ex Parte Motion.

No further action as required by the Order will be taken to avoid adversely affecting the ongoing criminal investigation and grand jury investigation and to protect the grand jury information, and the confidential witnesses, until the ongoing criminal investigation and the grand jury investigation are completed.

The ongoing criminal investigation, the ongoing grand jury investigation, the grand jury information, and the confidential witnesses should not be compromised by this civil case. Accordingly, this Ex Parte Motion and the Complaint should be sealed, and this civil action should be stayed.

II. ARGUMENT

A. This Court Should Seal This Civil Forfeiture Case.

The information in this Ex Parte Motion and the civil forfeiture Complaint must not be made available at this time to avoid adversely affecting the ongoing criminal investigation and the ongoing grand jury investigation and to protect the grand jury information, and the confidential witnesses.

1 The Ninth Circuit Court of Appeals stated, “The district court has the inherent power to seal
 2 affidavits filed with the court in appropriate circumstances. . . . The government contends that the
 3 materials should be sealed to protect the informant and to keep confidential the ongoing investigations.
 4 We find . . . the district court did not abuse its discretion.” *United States v. Mann*, 829 F.2d 849, 853
 5 (9th Cir. 1987) (citations omitted); *Offices of Lakeside Non-Ferrous Metals, Inc. v. United States*, 679
 6 F.2d 778, 779 (9th Cir. 1982) (“The district court has inherent powers to seal affidavits filed with the
 7 court in appropriate circumstances.”) (citation omitted); *In Re Sealed Affidavit(s) to Search Warrants*
 8 *Executed on February 14, 1979*, 600 F.2d 1256, 1257 (9th Cir. 1979) (“[T]he courts have inherent
 9 power, as an incident of their constitutional function, to control papers filed with the courts within
 10 certain constitutional and other limitations.”) (citations omitted).

11 The Ninth Circuit applies a balancing test in which the United States’s necessity for secret
 12 proceedings or sealed documents are weighed against the public’s interests that are affected by the
 13 court’s action. *Times Mirror Company v. United States*, 873 F.2d 1210, 1213-1216 (9th Cir. 1989);
 14 *Offices of Lakeside Non-Ferrous Metals, Inc.*, 679 F.2d at 779 (The courts use a balancing test.).

15 Because of CAFRA and in spite of the ongoing criminal investigation, the ongoing grand jury
 16 investigation, the grand jury information, and the confidential witnesses, the United States has one
 17 option at this time: to bring a civil forfeiture action, to seal the case, and to stay the civil action.
 18 Therefore, because this Ex Parte Motion and the Complaint contain information concerning the
 19 ongoing criminal investigation, the ongoing grand jury investigation, the grand jury information, and
 20 the confidential witnesses, this Court should seal this case.

21 **B. This Court Should Stay This Civil Forfeiture Proceeding Because Civil Discovery**
 22 **Will Adversely Affect The Ability Of The United States To Prosecute The Related Criminal**
 23 **Case And Will Disclose The Information Relating To Confidential Witnesses.**

24 Congress has specifically provided that upon motion of the United States, “the court *shall* stay
 25 the civil forfeiture proceeding if the court determines that civil discovery will adversely affect
 26 the ability of the Government to conduct a related criminal investigation or the prosecution of a related
 criminal case.” 18 U.S.C. § 981(g)(1) (emphasis added).

1 In this subsection, the terms “related criminal case” and “related
2 criminal investigation” mean an actual prosecution or investigation in
3 progress at the time at which the request for the stay, or any subsequent
4 motion to lift the stay is made. In determining whether a criminal case
5 or investigation is “related” to a civil forfeiture proceeding, the court
6 shall consider the degree of similarity between the parties, witnesses,
7 facts, and circumstances involved in the two proceedings, without
8 requiring an identity with respect to any one or more factors.

9 18 U.S.C. § 981(g)(4).

10 The Supreme Court has expressly approved the district court’s inherent power to approve stay
11 orders such as the one at issue here.

12 [T]he power to stay proceedings is incidental to the power inherent in
13 every court to control the disposition of the cases on its docket with
14 economy of time and effort for itself, for counsel, and for litigants.
15 How this can best be done calls for the exercise of judgment, which
16 must weigh competing interests and maintain an even balance.

17 Impressed with the likelihood or danger of abuse, some courts have
18 stated broadly that, irrespective of particular conditions, there is no
19 power by a stay to compel an unwilling litigant to wait upon the
20 outcome of a controversy to which he is a stranger. All the cases
21 advancing it could have been adequately disposed of on the ground that
22 discretion was abused by a stay of indefinite duration in the absence of
23 a pressing need. If they stand for more than this, we are unwilling to
24 accept them.

25 We must be on our guard against depriving the processes of justice of
26 their suppleness of adaptation to varying conditions. Especially in
cases of extraordinary public moment, the individual may be required
to submit to delay not immoderate in extent and not oppressive in its
consequences if the public welfare or convenience will thereby be
promoted.

Landis v. North American Co., 299 U.S. 248, 254-56, 57 S. Ct. 163, 166 (1936) (citations omitted).

See also Rohan v. Woodford, 334 F.3d 803, 817 (9th Cir. 2003) (“District courts have inherent
authority to stay proceedings before them. . .”) (citation omitted); *Stern v. United States*, 563 F. Supp.
484, 489 (D. Nev. 1983) (“Every court has the inherent power to stay causes on its docket with a view
to avoiding duplicative litigation, inconsistent results, and waste of time and effort by itself, the
litigants and counsel.”) (citations omitted).

...

The Supreme Court observed the widespread practice of “[f]ederal courts . . . deferr[ing] civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seem[] to require such action, sometimes at the request of the prosecution [and s]ometimes at the request of the defense.” *United States v. Kordel*, 397 U.S. 1, 12, 90 S. Ct. 763, 770, n. 27 (1970).

The Supreme Court has also stated that pending “criminal proceedings,” such as the ongoing criminal investigation and ongoing grand jury investigation, may justify delaying the forfeiture action.

Pending criminal proceedings present similar justifications for delay in instituting civil forfeiture proceedings. A prior judgment to contemporaneous civil proceeding could substantially hamper the criminal proceedings, which – as here – may often include forfeiture as part of the sentence. A prior civil suit might serve to estop later criminal proceedings and may provide improper opportunities for the claimant to discover the details of a contemplated or pending criminal prosecution.

United States v. \$8,850, 461 U.S. 555, 567, 103 S. Ct. 2005, 2013 (1983) (citations omitted).

Similarly, other courts have deferred to the public interest in law enforcement by giving priority to pending criminal prosecutions over a civil litigant’s interest in the prompt adjudication of his or her civil claim.

In *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955, 83 S. Ct. 502 (1963), the Fifth Circuit noted the conflicting policies and objectives underlying the rules of discovery in federal civil and criminal cases:

In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. . . . A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit.

Campbell, 307 F.2d at 487 (citations omitted); *Bittaker v. Woodford*, 331 F.3d 715, 734-35 (9th Cir. 2003) (O’Scannlain, J., and Rawlinson, J., concurring); *Osband v. Woodford*, 290 F.3d 1036, 1042-43 (9th Cir. 2002).

1 The court in *Campbell* also stated:

2 The very fact that there is a clear distinction between civil and criminal
3 actions requires a Government policy determination of priority: which
4 case should be tried first. *Administrative policy gives priority to the*
5 *public interests in law enforcement.* This seems so necessary and wise
6 that a trial judge should give substantial weight to it in balancing the
7 policy against the right of a civil litigant to a reasonable prompt
8 determination of his civil claims or liabilities.

9 *Id.* at 487 (emphasis added).

10 As Judge Bell noted in his concurring opinion, "The criminal aspect of the matters could not
11 be ignored [because] the end result [of allowing discovery] was tantamount to allowing discovery
12 under Federal Rules of Civil Procedure in a criminal proceeding, something we are powerless, as was
13 the trial court, to authorize." *Campbell*, 307 F.2d at 492-493.

14 Courts also have approved the stay of civil proceedings simply because a civil litigant has the
15 potential to exploit civil discovery to the detriment of a related criminal investigation. In *United*
16 *States v. Mellon Bank, N.A.*, 545 F.2d 869 (3d Cir. 1976), the civil litigant had asserted his Fifth
17 Amendment privilege against self-incrimination during the discovery process as he simultaneously
18 sought Government production of documents which pertained to the ongoing criminal case against
19 him. The Third Circuit upheld the stay of the civil jeopardy assessment action upon a finding that the
20 mere similarity of issues between the civil and criminal cases opened the door for the taxpayer to
21 abuse civil discovery in order to gain an advantage in his criminal case.

22 It was clearly within the power of the district court to balance
23 competing interests and decide that judicial economy would best be
24 served by a stay of civil proceedings. The court found, and Meissner
25 [the taxpayer] does not contend otherwise, that the civil matter before
26 it and the criminal case in New York involved substantial matters of
the same nature. Hence, it might well have been that resolution of the
criminal case would moot, clarify, or otherwise affect various
contentions in the civil case. Furthermore, the similarity of the issues
left open the possibility that Meissner might improperly exploit civil
discovery for the advancement of his criminal case.
Mellon Bank, N.A., 545 F.2d at 872-873 (citations and quotes omitted).

27 In *Larouche Campaign v. F.B.I.*, 106 F.R.D. 500, 501 (1985), the court stated that the broad
28 rules of civil discovery cannot be used to circumvent the more restrictive rules of criminal discovery.

1 To protect against circumvention of discovery rules in criminal proceedings and to protect against
2 impediments to an ongoing criminal investigation, the court in *Larouche* granted a stay of civil
3 discovery. The stay order was limited in time until the Grand Jury failed to return an indictment or
4 until the conclusion of the presentation of evidence at trial in the parallel criminal proceeding. *Id.* at
5 502. *See also White v. Mapco Gas Products, Inc.*, 116 F.R.D. 498, 503 (1987).

6 In its enactment of the Victim and Witness Protection Act of 1982, Congress recognized the
7 importance of protecting victims and witnesses in federal criminal cases. This legislative protection
8 was intended to prevent the intimidation and harassment of witnesses, including confidential
9 witnesses, during the criminal case process. However, the legislative committee acknowledged that
10 the Victim and Witness Protection Act could not be drafted with sufficient breadth to encompass all
11 witness intimidation and harassment situations. In *United States v. Tison*, 780 F.2d 1569 (11th Cir.
12 1986), during a pending federal criminal action, the counsel for the defendants attempted to bring a
13 state civil action to avoid the restrictions on federal criminal discovery and thereby obtain documents
14 and have access to witnesses that a defendant would not ordinarily be entitled to for use in the criminal
15 case.

16 The court in *Tison* affirmed the district court order enjoining the criminal defendants from
17 bringing a state civil action. In reaching its decision in the *Tison* case, the court disapproved of the
18 usage of “the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions
19 on criminal discovery . . .” *Id.* at 1572. The *Tison* decision also indicated that the obstruction of
20 justice statute may not be a sufficient safeguard to protect witnesses in the situation where the civil
21 discovery and criminal discovery rules come into conflict. *Id.* at 1572.

22 The enactment of 18 U.S.C. § 981(g) reflects Congressional recognition of the competing
23 interests at stake when there is a pending civil forfeiture action which is related to an ongoing criminal
24 investigation. The statute resolves those competing interests by showing deference to the superior
25 interest in having an unfettered completion of the criminal matter even though the civil case must
26 consequently suffer a delay.

1 The United States seeks to seal and to stay this civil forfeiture proceeding to allow the
2 completion of the ongoing criminal prosecution related to this civil case. The ongoing criminal
3 prosecution will be placed at risk through the premature disclosure of the civil forfeiture action, the
4 witnesses, and the documents which would be routinely discovered in a civil action. In both cases,
5 the parties are the same; the witnesses are the same; the facts are the same; and the circumstances are
6 the same. To continue with the forfeiture action at this time would frustrate and inhibit the orderly
7 completion of the criminal prosecution by allowing civil discovery, which could prematurely disclose
8 sensitive details of the criminal prosecution. The disclosure of the details of the criminal prosecution
9 would be substantially prejudicial to the United States.

10 **III. CONCLUSION**

11 This Court should grant the United States's motion to seal and to stay this civil forfeiture
12 action to avoid adversely affecting the ongoing criminal investigation and the ongoing grand jury
13 investigation and to protect the grand jury information, and the confidential witnesses.

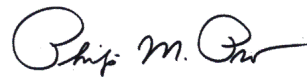
14 DATED 19th day of August, 2011.

15 Respectfully submitted,

16 DANIEL G. BOGDEN
17 United States Attorney

18 /s/ Michael A. Humphreys
19 MICHAEL A. HUMPHREYS
20 Assistant United States Attorney

21 IT IS SO ORDERED:
22

23 
24
25 UNITED STATES DISTRICT JUDGE

26 DATED: _ August 22, 2011. _____